No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IVAN BULJUBASIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict which exists between the Fifth Circuit and the Seventh Circuit as to the standard for determining the degree and nature of antagonistic defense which requires a severance in criminal cases?

2. Is due process denied a defendant where after co-defendant's counsel asserts that his defense is that defendant coerced co-defendant to participate in the crime asserted, a severance is denied until after the government and defendant rest, thereby subjecting defendant to co-defendant's counsel functioning as a prosecutor, cross-examining defendant and cross-examining government witnesses so as to rehabilitate them, and then, when severance is granted to co-defendant, permitting that co-defendant to testify under immunity for the government and against defendant?

3. Is due process denied where defendant, after having been warned under Miranda, provides a statement and is released and relies on Miranda warnings to fail to report a post-release incident, and the government is permitted to argue to the jury that defendant's failure to report is evidence of guilt, and defendant is not permitted to demonstrate to the jury that he relied on his prior Miranda warning in not reporting the subsequent incident?

4. Is due process denied when the government, which obtained all incriminating testimony by grant of de facto or de jure immunity, is permitted to refuse to grant use immunity to a conspirator who had pled guilty and who, if called, would testify defendant was not involved?

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Ivan Buljubasic, was the defendant in the District Court for the Northern District of Illinois, Eastern Division, and appellant in the Court of Appeals for the Seventh Circuit. Respondent, United States of America, was plaintiff in the District Court, and appellee in the Court of Appeals.

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statement, after receiving Miranda warnings, he may not subsequently rely on those warnings to fail to report a post-warning incident, so that the government can assert that such failure is evidence of his guilt. Defendant's privilege against self-incrimination and his constitutional right to due process of law were denied: the government impeached defendant with the fact that he did not make reports to the authorities, where this occurred after defendant was given Miranda warnings; the government was permitted to argue to the jury that defendant's not making such reports proved his guilt; defendant was prevented from explaining that he did not make such reports in reliance upon the prior advice provided by the government. 32

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Ivan Buljubasic (hereafter, defendant), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming his conviction and sentence for

conspiracy to destroy a building by means of explosives and to commit mail fraud, 18 U.S.C., Sec. 371, arson and attempt arson in violation of the Explosives Control Act, 18 U.S.C., Sec. 844, and mailing fire insurance claims in violation of 18 U.S.C., Sec. 1341.

Judgment, Opinion and Order Below

The Opinion of the Court of Appeals for the Seventh Circuit, Nos. 86-1263 and 86-2269, not yet published, is set out as Appendix A.

Jurisdictional Statement

On January 7, 1987, the Court of Appeals for the Seventh Circuit filed its Opinion herein. (App. A) Defendant's timely Petition for Rehearing was denied on February 2, 1987. (App. B) This

petition to review the judgment of a federal court of appeals is timely filed within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

Constitutional Provision

AMENDMENT [V.]

No person shall be ... deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Nature of the Case

Defendant, Ivan Buljubasic, was indicted, with others, for conspiracy to destroy a building by means of explosives and to commit mail fraud, 18 U.S.C., Sec. 371, arson and attempt arson in violation

of the Explosives Control Act, 18 U.S.C., Sec. 844, and mailing fire insurance claims in violation of 18 U.S.C., Sec. 1341. A jury convicted defendant as charged, and defendant was sentenced for conspiracy (Count 1) to suspended incarceration and a $10,000.00 fine; on substantive violations of the Explosives Control Act (Counts 2, 3, 4) ten year sentences concurrent with each other and a $10,000.00 fine as to each count; on mail fraud (Count 5) two years incarceration consecutive to that imposed under Counts 2, 3 and 4 and a $10,000.00 fine, on mail fraud (Count 6) five years probation to commence upon release from incarceration and restitution in the sum of $4,200.00 to a named person as a special condition.

The Court of Appeals for the Seventh Circuit affirmed (App. A) and defendant's timely Petition for Rehearing was denied on February 2, 1987.

Jurisdiction of Trial Court
[per Rule 21.1(i)]

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction ... of all offenses against the law of the United States." Defendant was charged with having committed an offense against a law of the United States, to wit, 18 U.S.C., Sections 371, 844 and 1341.

Statement of Facts

In 1980, Slobodan Pavlovic was a realtor engaged in conspiracies to assist others in hiding money in order to avoid taxes and "launder" money obtained in illicit narcotics transactions. (R.D. 100)[1] Pavlovic arranged for Kraja and his partner, Vukic, to buy 4417-4429 N. Clifton for $100,000.00 cash (Tr. 79) and arranged for fire insurance in the amount of $350,000.00. After Kraja determined it was in a far worse condition than he had expected, being angry with Pavlovic and fearing he would lose his $50,000.00 (Tr. 94-95), he told Pavlovic he wanted to sell the building for $120,000.00. (Tr. 84) Under pressure of Kraja to find

1. "Tr." refers to pages of the Transcript of Proceedings; "R.D." to document numbers within the Common Law Record.

a buyer, Pavlovic sought out Ivan Buljubasic who with partners bought the Clifton building for $137,000.00 of which sum $37,500.00 was paid down (Tr. 1974-1975) and a note was taken for $100,000.00. There was no personal obligation, the building being the only security. Kraja was still owed substantial funds with the building being its only security.

Buljubasic and partners took possession on November 25, 1980 (Tr. 1979), personally repaired apartments and placed a new roof on the building. They planned to improve the building by their own labor.

Defendant's partners became frightened by certain people in the area (Tr. 247), and wanted out. Defendant agreed to relieve them of their obligation and pay

them off if he could salvage the building. (Tr. 226-227) He remained because he was single and they were married with children. (Tr. 227-228)

Ilija Zabic and Ivan Siprak were paid $9,000.00 by checks issued at the direction of Slobodan Pavlovic for hiring Robert Samuelson to burn down the building. Samuelson, caught attempting to burn the building, pled guilty and cooperated with authorities. Zabic and Siprak were charged with arson (18 U.S.C., Sec. 844). Siprak pled guilty. Zabic, at his trial, did not testify and was found guilty by a jury. At the sentencing, counsel for Siprak advised the court that Siprak, while desirous to help himself by helping the government, knew nothing about defendant Buljubasic

and could not help. (R.D. 175)[2] Zabic told the sentencing judge that he was not guilty and had nothing to do with the fire. (Tr. 744)

After beginning to serve his prison sentence, Zabic in exchange for a reduction of sentence from 10 to 5 years, provided the government with a version of events inculpating defendant. In this version, he claimed defendant solicited him to find someone to burn the

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2. Siprak stated:

> "I don't know Mr. Buljubasic, I never had any conversations with him about that.... I wish I had, because I'd have something that I could give in return.... I can't lie about it, that would not be right." (R.D. 175)
>
> * * *
>
> "The only way I could give any evidence on Mr. Buljubasic would be to lie." (R.D. 175)

building. He claimed that he and Buljubasic went to Pavlovic who agreed to pay Zabic on behalf of Buljubasic once the job was done.

In his version, he never asked for money for his part, but defendant, on his own, in addition to paying $3,000.00 to the person who would do the arson, volunteered to just hand over $3,000.00 to Siprak and $4,000.00 to Zabic. (Tr. 781) Zabic claimed that if defendant had not offered that $7,000.00 out of generosity, he would have received nothing. (Tr. 781)

Pavlovic at a grand jury and at Zabic's trial testified that he had no dealings with Zabic except for one business loan. After the severance was granted and he was given immunity, he testified his prior testimony was

perjured and stated that he had an agreement with Zabic and Buljubasic to hold money to be paid to Zabic for finding someone to fire the building.

Howard Vess avoided a 5 year sentence upon a violation of probation by recalling conversations with Siprak that mentioned that Zabic had been hired by the owner of the building. Diane Siprak avoided prosecution by recalling similar conversations with her husband.

Insurance proceed checks paid on the fire insurance were ultimately paid to Kraja who held the mortgage.

Shortly before trial, November 12, 1985, defendant moved for severance on the basis that Pavlovic's defense was to be that defendant had coerced Pavlovic to be involved with holding money to be provided to Zabic for setting the fire.

Pavlovic asserted:

"2. That he intends to take the stand and testify on his own behalf in the trial of that case.

3. That he is innocent of the charges in the indictment.

4. That he paid Elija Zabic the sum of 9000.00 at Ivan Buljubasic's instructions after the arson on Clifton Avenue occurred.

5. That to his knowledge Ivan Buljubasic hired Ilija Zabic and Ivan Siprak to set fire to the apartment building on Clifton Avenue."

Pavlovic also advised the court of his intention to prove that he feared Buljubasic and money was paid to Zabic because of threats to Pavlovic by Buljubasic. (Tr. 65-66)

The motions for severance were denied.

On November 18, 1985, still before trial, Pavlovic's attorney stated that Pavlovic would testify that Buljubasic by

threatening him with guns coerced him to provide "arson money to pay Mr. Zabic." (Tr. 1) The government argued that Pavlovic should be prohibited from making this defense because it was being raised immediately prior to trial. The court disagreed, ruling that she would not "preclude raising that defense." (Tr. 2-3) Although Pavlovic's attorney, in response to inquiry as to whether Pavlovic would testify, specifically advised the court that "Mr. Pavlovic is taking the stand." (Tr. 6), the court denied the motion for severance. The motion was denied even though the court recognized that if Pavlovic presented his testimony as to coercion, "that would require a severance because that is definitely a defense ... incompatible

with Mr. Buljubasic's defense." (Tr. 802)

Trial commenced with counsel for Pavlovic advising the court that his plan was to work to prove Buljabasic guilty. After the government's first witness, Pavlovic's attorney advised the court that:

> "... basically he (counsel for defendant) spent the direct examination inferring that my defendant and Kraja ... burned down the building. I spent the whole examination rehabilitating their (the government's) witness." (Tr. 201)

He then predicted:

> "... this is what we are going to be doing the whole trial." (Tr. 201)

Counsel for Pavlovic proceeded in this manner through the trial. He: (a) engaged in vicious, lengthy and hostile cross-examination of defendant, distinct in character and subject matter from the

examination conducted by the prosecution, putting defendant to two separate hostile cross-examinations; (b) used his ability to lead witnesses during cross-examination very effectively to harm Buljubasic's defense by rehabilitating government witnesses (Tr. 145-154); (c) established a motive for defendant to burn the building (Tr. 271-272); (d) assisted a key government witness by enabling him to completely reiterate his accusation against defendant (Tr. 876-877, 910-917); (e) introduced prior inconsistent statements to enhance that witness' testimony against Buljubasic, although the government could not have done so; (f) introduced defendant's name prejudicially into the testimony of a witness he was cross-examining so as to

develop his theory of defendant's guilt. (Tr. 1408-1409)

After Buljubasic rested, the court granted the severance and at the request of the government proceeded to trial against Buljubasic and caused Pavlovic to be given immunity and had him testify against Buljubasic.

REASONS FOR GRANTING THE WRIT

1. This Court should resolve the conflict which exists between the Fifth Circuit and the Seventh Circuit as to the standard for determining the degree and nature of antagonistic defense which requires a severance in criminal cases.

2. The opinion of the Seventh Circuit has misinterpreted this Court's holding in Anderson v. Charles, 447 U.S. 404 (1980) in holding that once a person makes a statement, after receiving Miranda warnings, he may not subsequently rely on those warnings to fail to report a post-warning incident, so that the government can assert that such failure is evidence of his guilt. Defendant's privilege against self-incrimination and his constitutional right to due process

of law were denied: the government impeached defendant with the fact that he did not make reports to the authorities, where this occurred after defendant was given Miranda warnings; the government was permitted to argue to the jury that defendant's not making such reports proved his guilt; defendant was prevented from explaining that he did not make such reports in reliance upon the prior advice provided by the government.

3. Due process was denied when the government, which obtained all incriminating testimony by grant of de facto or de jure immunity, was permitted to refuse to grant use immunity to a conspirator who had pled guilty and who, if called, would testify defendant was not involved.

ARGUMENT

1.

This Court should resolve the conflict which exists between the Fifth Circuit and the Seventh Circuit as to the standard for determining the degree and nature of antagonistic defense which requires a severance in criminal cases.

This Court's decisions concerning severance in criminal cases[3] have never resolved the widespread disagreement over the question--what level of antagonism between co-defendants must occur to require that severance be granted? There is disagreement between various federal

3. United States v. Merchant, 12 Wheat 480, 6 L.Ed. 700 (1827); Upper v. United States, 348 U.S. 84, 75 S.Ct. 158, 45 ALR 2d 1308 (1954); Delli Paoli v United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957); Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960); Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); United States v. Lane, ___ U.S. ___, 106 S.Ct. 925, 88 L.Ed.2d 814 (1986).

courts of appeals, and between various states as to the proper standard. The Seventh Circuit requires that antagonistic defenses be irreconcilably and mutually exclusive,[4] while the Fifth Circuit standard does not require that the antagonism be mutually exclusive.

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4. The Court herein stated:

"Inconsistent defenses also may create prejudice. But as a rule evidence and arguments may be controlled by the court, and inconsistent defenses are not enough to require severance... Fingerpointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact. Unless the defenses are so inconsistent that the making of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense precludes acquittal of other defendants, it is not necessary to hold separate trials." (Emphasis in original.) (App. A, p. 5)

United States v. Romanello, 726 F.2d 173 (5 Cir. 1984).[5]

Moreover, the rule adopted by the Seventh Circuit has been rejected by various state reviewing courts, i.e., Illinois, People v. Byron, ___ Ill.2d ___, ___ N.E.2d ___, Docket No. 56144, decided January, 1986;[6] Rhode Island, State v. Clark, 448 A.Rptr.2d 1208; Massachusetts, Commonwealth v. Moran, 387 Mass. 644, 442 N.E.2d 399; and Louisiana,

5. In Romanello, the court stated:

"It is not necessary for each defendant to base the core of his defense on the direct accusation of co-defendant. Severance may be required if only one defendant accuses the other, and the other denies any involvement." 726 F.2d at 177.

6. In Byron, the court stated:

"Where one defendant accuses his co-defendant, an antagonism arises which requires separate trials; otherwise the alternative is a 'circus' (p. 5) ..."

State v. Webb, 424 S.2d 233.

The disagreement is not only on whether antagonistic defenses must be mutually exclusive in order to require severance, but also over what type of tactic used by one defendant is sufficiently prejudicial to require a severance (and if that is not granted, a new trial). The United States Court of Appeals in the Fifth Circuit in United States v. Romanello, supra, and various state supreme courts, including the Illinois Supreme Court in People v. Byron, supra, have held that prejudice occurs where, during trial, the actions of a defense lawyer cause him to take on the role of an additional prosecutor. In Romanello, the court stated:

> "The dangers inherent in a joint trial become intolerable when the co-defendants become gladiators, ripping each other's

> defense apart. In their antagonism, each lawyer becomes the government's champion against the co-defendant, and the resulting struggle leaves both defendants vulnerable ..." 726 F.2d at 182.

This is very different from the position of the Seventh Circuit, wherein the court held that a co-defendant's counsel attacking defendant is not error as long as it is "within the tolerable range."[7]

Here occurred the very type of circus found prejudicial by the United States Court of Appeals in Romanello, supra--co-defendants becoming gladiators and ripping each other's defense apart. Defendant faced not only the government prosecutor, but the attorney for his co-defendant acting as a separate

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7. The court set no standard for "tolerable range."

prosecutor. Co-defendant's defense counsel cross-examined state witnesses (as the prosecutor could not) in order to rehabilitate them or elicit evidence against the defendant[8]; co-defendant's lawyer viciously cross-examined defendant in order to derogate him and his account

8. Co-defendant's counsel's prosecutorial function continued in his cross-examination of Attorney Monico who Zabic and defendant had seen after Zabic's conviction. He attempted to demonstrate that Zabic related to Monico the facts of the occurrence as distinct from facts of the government's theory, and by so doing to demonstrate that Zabic had previously accused Buljubasic, even to his own lawyer, but had never accused Mike Pavlovic. (Tr. 1609-1621) In his cross-examination, he specifically brought out that Zabic talked to Monico about the case and never mentioned Mike Pavlovic, thereby implying that he did mention his being involved with Ivan Buljubasic. (Tr. 1639-1640) The government did not bring out such evidence, because it was their theory that Zabic had discussed with Monico only the government's theory, but never the facts of the case.

of his innocence, and co-defendant's lawyer brought out prior statements of Zabic under the guise of impeachment that inculpated the defendant while exculpating his own client.

The prejudice to defendant was severe. Defendant's entire defense depended upon his own credibility refuting Zabic and Pavlovic each who had previously in court asserted their own lack of involvement with the arson.[9] His credibility was hurt by the co-defendant's counsel's cross-examination

9. Other than circumstantial evidence, primarily that the defendant was the owner of the building--the sole evidence connecting him with the offense was testimony of Zabic and Pavlovic, admitted perjurers, who had initially in court and/or under oath denied their involvement and then in order to either reduce their sentence and/or shift blame to the defendant, made statements which were in total contradiction to their prior statements.

that was more effective than the cross-examination by the government.

Co-defendant's counsel's whole cross-examination of defendant was a frontal attack on his credibility. This attempt to destroy Buljubasic's credibility began when he began his cross-examination of defendant by connecting the defendant with "Bozo the clown." (Tr. 2208) He followed through, emphasizing scorn for the defendant, accusing him of cheating his partners. (Tr. 2213) He asserts "You didn't tell your partners about the $14,000 did you--these people that you were brought up in the village with in the old country--these hard working soles [sic] that were going to help you repair Clifton?" (Tr. 2267) He accused defendant of being a liar (Tr. 2215), one who testified to "nothing but a lot of

malarky." (Tr. 2215) He showed scorn for defendant's answers. Concerning his client, Pavlovic, he asked Buljubasic a vague and general question concerning his belief that Pavlovic had lied to him. (Tr. 2227) When the question elicited a clear response of more than a half dozen words, he acidly inquired: "Are you finished? Are you finished now? I don't want to interrupt you." (Tr. 2228) showing his disbelief in defendant's answer. The objection to his conduct was overruled by the trial court.

He asserted that the defendant was looking for coaching from his counsel, whom he refers to familiarly in the presence of the jury, i.e., "You don't have to look at Fred." (Tr. 2229) He also asserted that Buljubasic had claimed that a lawyer had cheated him. "Did the

lawyer cheat you that day too?" (Tr. 2229) he asked, although there was no testimony by Buljubasic that any lawyer had cheated him, that or any day.

A particularly acid and prejudicial line of questioning occurs where he three times mocks the witness. (Tr. 2264) He forcibly harassed defendant about unrelated business deals (Tr. 2238-2250), suggesting those deals were the source of the money used by Pavlovic to pay Zabic. (Tr. 2302-2303)

The examination was 96 pages of the record and lasted 2 to 3 hours.

The Court of Appeals categorizes this cross-examination as merely sarcastic. (App. A, p. 12) It was far more than that. It was an attack on defendant's credibility by a skilled craftsman. The artful attack weakened defendant's

credibility before the jury. It was prejudicial for a defendant to have to withstand such an attack by counsel for co-defendant. United States v. Romanello, supra.

The Court of Appeals asserts that there were few objections during the cross-examination of defendant. There were objections, but they diminished in frequency once it became evident almost immediately during the cross-examination of defendant that the court intended to place almost no limits upon the questioning and surely not proper ones.[10]

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10. For example, at the very beginning of cross-examination within the first six questions put to defendant, when he asked most improper and disparaging questions, the court overruled the objection:

"Q: And you don't know whether they burned down the building or not?

A: No, I don't.

Pavlovic's attorney implicated Ivan Buljubasic at every opportunity, paving the way for his client to become a government witness late in the trial. His conduct while Pavlovic was a co-defendant obviously increased Pavlovic's value to the government in his eventual role as prosecution witness.

Footnote 10 continued:

Q: You don't know whether Bozo the clown burned down the building either, do you?

Mr. Cohn: Objection, your Honor.

The Court: Overruled.

By the Witness:

A: Who?

By Mr. Genson:

Bozo the clown." (Tr. 2208)

See also Tr. 2228, 2233, 2256, 2263, 2048, 2062, 2117 for other times where the court failed to sustain proper objection.

The prejudice to Ivan Buljubasic was not removed when his co-defendant was granted severance; instead Pavlovic's testimony re-emphasized the prejudicial effect of the actions of Pavlovic's counsel on Buljubasic.

This Court should grant certiorari to resolve the conflict that exists between the Seventh and Fifth Circuits and the conflict which exists between various state reviewing courts and the Seventh Circuit.

2.

The opinion of the Seventh Circuit has misinterpreted this Court's holding in Anderson v. Charles, 447 U.S. 404 (1980) in holding that once a person makes a statement, after receiving Miranda warnings, he may not subsequently rely on those warnings to fail to report a post-warning incident, so that the government can assert that such failure is evidence of his guilt. Defendant's privilege against self-incrimination and his constitutional right to due process of law were denied: the government impeached defendant with the fact that he did not make reports to the authorities, where this occurred after defendant was given Miranda warnings; the government was permitted to argue to the jury that defendant's not making such reports proved his guilt; defendant was prevented from explaining that he did not make such reports in reliance upon the prior advice provided by the government.

The Seventh Circuit erroneously held the Doyle rule inapplicable because defendant did not initially refuse to speak (App. A, p. 13); this is a misinterpretation of Doyle-Hale that shall misguide District Judges and result in substantial impairment of defendants'

constitutional rights. Anderson v. Charles, 447 U.S. 404 (1980) does not support the distinction of Doyle adopted in the opinion in this case.

The trial court permitted the government to present evidence and argument that defendant did not report Zabic's attempt to extort him, which occurred after Zabic's conviction, because defendant is guilty of the crimes charged in the indictment. (Tr. 2876) The court permitted this argument over defendant's objection that because the extortion occurred after defendant had received Miranda warnings and because defendant relied upon those warnings (Tr. 2306-2307) in not reporting the

incident,[11] the prosecution argument violated defendant's right to due process of law. United States v. Hale, 422 U.S. 171, 45 L.Ed.2d 99 (1975); Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91 (1976); Wainwright v. Greenfield, 474 U.S. ___, 88 L.Ed.2d 623 (1986).

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11. On February 6, 1981 and in April, 1982, the defendant was told by government agents that he was a suspect, that he need not talk to the government without a lawyer present, that he had a right to remain silent and that anything he said could be used against him. (Tr. 2309-2314) He was subsequently given the same advice by an Assistant United States Attorney. (Tr. 36) While he chose to speak at that time because he believed that as an innocent person he could clear himself by answering their questions, he thereafter determined, based on the article which was printed at the time Zabic was convicted, that the government nevertheless still considered him to be a suspect and could not be persuaded of his innocence. Relying on the advice he had previously received from the government, he did not report the extortion attempt. (Tr. 2005, 2326-2327, 2366)

Anderson v. Charles, 447 U.S. 404 (1980) and Phelps v. Duckworth, 772 F.2d 1410 (7 Cir. 1985), relied upon by the Court of Appeals, are distinguishable because in both, defendant was impeached not with silence or by failure to report, but with a previously recounted story that was inconsistent with trial testimony. Anderson and Phelps do not limit Doyle v. Ohio, 426 U.S. 610 (1976) only to the period of the interview, do not hold that Doyle is inapplicable to defendant's acts of silence at a time distant from the interview, where the defendant, due to the continuing government suspicion and/or intent to prosecute, invokes Miranda rights pursuant to the previous admonitions.

Here, the logic of Doyle controls. Believing in his own innocence, a person

interrogated and given Miranda warnings may choose to relate his account of events, thus for a time waiving the right to remain silent. Such a limited waiver does not alter his right, without additional warning, to rely on the warning he received, and it would be logical for him to do so, where the authorities obviously do not believe his statement, and he is advised that they still intend to prosecute him. Moreover, in such circumstances, a suspect has just as much right not to approach the authorities to give a statement relating facts concerning a post-interrogation occurrence, as he does to refuse to answer the questions of the authorities if they again approach him. The interpretation of the Doyle-Hale rule adopted by the Seventh Circuit is in

direct contradiction of Miranda, upon which that rule is based. Miranda specifically holds that a defendant given warnings can, after speaking, decide to stop at any time. 384 U.S. 436, 16 L.Ed.2d 694, 707 (1966). Hence, a defendant can, after speaking, still rely on his Miranda warnings.

The due process violation was aggravated because defendant was prevented from explaining his failure to report. An impeached witness has an inherent right to respond and to explain a prior inconsistency. United States v. Cirillo, 468 F.2d 1233 (2 Cir. 1972). Hence, where a defendant asserts that his silence was caused by Miranda warnings, defendant has a recognized right to explain that silence by citing the prior Miranda warnings. Doyle, 426 U.S. at

626, 49 L.Ed.2d at 102. He has the right to have the jury evaluate this evidence, which is clearly relevant to why he did not come forward and report the incident. The denial of defendant's right to respond to the impeachment is itself a violation of defendant's due process rights, as well as an aggravation of the admission of the evidence.

3.

Due process was denied when the government, which obtained all incriminating testimony by grant of de facto or de jure immunity, was permitted to refuse to grant use immunity to a conspirator who had pled guilty and who, if called, would testify defendant was not involved.

All witnesses who provided incriminating (as distinct from neutral) evidence about defendant received de jure or de facto immunity--Pavlovic, Zabic, Vess, Diane Siprak. Defendant requested use immunity for Ivan Siprak because Siprak, who had pled guilty and would have had to have been involved with defendant if defendant was guilty, gave a statement to authorities refuting Zabic's account of defendant's presence and advised the court at his sentencing that he did not know defendant.

There was no proper basis for the government to refuse a grant of use

immunity. Siprak had pled guilty and grant of use immunity would not reduce the government's ability to prosecute him. The government's decision not to grant immunity was made with the deliberate intention of distorting the judicial fact-finding process. See United States v. Lord, 711 F.2d 887 (9 Cir. 1983); United States v. Morrison, 535 F.2d 223 (3 Cir. 1976); United States v. Herman, 589 F.2d 1191 (3 Cir. 1978); Virginian Islands v. Smith, 615 F.2d 964 (3 Cir. 1980). See also, defense witness immunity and the right to a fair trial, 129 University of Pennsylvania Law Review, 377, 1980.

Due process is violated where the defendant is prevented by the government from presenting exculpatory testimony. Chambers v. Mississippi, 410 U.S. 284, 35

L.Ed.2d 297, 93 S.Ct. 1038 (1973). This Court must decide if the government can obtain conviction by granting use immunity to all participants but the one who would exculpate defendant, where that witness had been convicted and hence, the government's grant of use immunity results in no real inability to prosecute that person.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 86-1263 and 86-2269

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IVAN BULJUBASIC and SLOBODAN PAVLOVIC,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 CR 752—Barbara B. Crabb, *Judge*.

ARGUED DECEMBER 3, 1986—DECIDED JANUARY 7, 1987

Before CUMMINGS, CUDAHY, and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Robert Samuelson put the torch to an occupied apartment building in Chicago. The effort to destroy the building failed; Samuelson tried and failed again three days later; he was caught after trying the third time. Samuelson identified Ivan Siprak and Ilija Zabic as the people who had hired him and furnished gasoline, but they fled with the aid of $9,000 they had received from Slobodan Pavlovic, the real estate dealer who had sold the building to Ivan Buljubasic and arranged for substantial insurance on it. Siprak and Zabic eventually were caught. Samuelson and Siprak pleaded guilty to attempted arson; Zabic was convicted of arson after a jury

trial and became the prosecution's star witness in the trial of Buljubasic and Pavlovic.

Zabic testified that Buljubasic hired him to find an arsonist, so that Buljubasic could collect insurance on the dilapidated building. Buljubasic was convicted of violations of the Explosives Control Act, 18 U.S.C. §844(i), for arranging the arson and participating in its execution; of mail fraud, 18 U.S.C. §1341, for collecting on the insurance policy; and of conspiring to do these things. He received a total of 12 years' imprisonment, was fined $41,000, and was directed to pay restitution of $4,200. Pavlovic was charged with the conspiracy, with aiding and abetting Buljubasic by paying Zabic, and with threatening Zabic to prevent his testimony. Two weeks into the joint trial, Pavlovic's case was severed from Buljubasic's and Pavlovic was granted a mistrial. Pavlovic vowed to testify that he knew what the payment to Zabic was for and paid Zabic in fear of his life; he depicted Buljubasic as a violent person who would not have let Pavlovic leave the room alive if he had not given $9,000 to Zabic. The district court thought that this degree of conflict in the defenses precluded a continuation of the joint trial.

The joint trial produces the only substantial issues on appeal. Buljubasic contends that Pavlovic's lawyer tried to fix the blame on Buljubasic, creating prejudice that requires reversal. Pavlovic maintains that the double jeopardy clause of the fifth amendment precludes a second trial after the mistrial. Both arguments depend on the circumstances that led the trial to proceed for so long before the severance was granted.

I

The arsons took place in January 1981. Zabic was convicted in 1983. Buljubasic and Pavlovic were indicted in October 1984. The indictment charged a common scheme, making the joinder proper under Fed. R. Crim. P. 8(b). At the time of the indictment the prosecutor had little reason to think that Buljubasic and Pavlovic would ad-

vance antagonistic defenses. Buljubasic had denied from the beginning knowing about or having anything to do with the arson, or even knowing Zabic (more than casually) until after Zabic's conviction. (Buljubasic maintained this position through his trial.) Pavlovic had testified at Zabic's trial and before a grand jury; he also had given statements to the prosecutors. On all occasions Pavlovic had denied knowing the purpose of any payment his company made to Zabic (the checks to Zabic had been signed by one of Pavlovic's employees, not by Pavlovic personally) or having any involvement in the scheme. Pavlovic said that the $9,000 were escrowed funds for repairs that Zabic and others were performing for Buljubasic. Perforce Pavlovic had not claimed to be the victim of coercion.

More than 13 months after the indictment—and only 12 days before trial—Pavlovic moved for a severance under Fed. R. Crim. P. 14. The two-page motion stated in a cursory fashion that the defenses were antagonistic. The only detail was:

> Buljubasic intends to take the stand on his own behalf and testify that Defendant Pavlovic hired . . . Zabic to burn the building . . . . Similarly, it is Defendant Pavlovic's intention to take the stand and testify that to his knowledge co-defendant Buljubasic hired Zabic to burn the building.

As it turned out, Pavlovic was wrong about Buljubasic's defense; Buljubasic never pointed a finger at Pavlovic or anyone else. The motion, which Buljubasic did not join, does not provide details or suggest that Pavlovic will accuse Buljubasic of coercion.

Pavlovic later filed three affidavits in support of his motion. One, dated November 7, is by Buljubasic's counsel, who stated that Buljubasic would testify and that "I shall argue to the jury *if I have been able to develop evidence* . . . that . . . Pavlovic may have arranged with Mr. Zabic for the burning of the building." (Emphasis added.) Counsel never developed that evidence. A second, dated November 12, is by Pavlovic's counsel. This affidavit stated

unequivocally that the defense would be that Buljubasic hired Zabic and Siprak to burn the building and that "Buljubasik [sic] authorized payment to Ilija Zabic and had Slobodan Pavlovic pay Zabic the sum of $9,000." Again no mention of coercion, and no suggestion that Pavlovic would concede that he knew the purpose of the payment. The third affidavit is by Pavlovic and was tendered at the hearing on November 14. This affidavit states that Pavlovic paid $9,000 to Zabic at Buljubasic's instructions and that Pavlovic knew Buljubasic hired Zabic to burn the building.

In open court on November 14, Judge Grady denied Pavlovic's motion for severance and Buljubasic's belated oral motion for the same relief. Judge Grady thought that the allegations of conflicting defenses were too sketchy. Indeed they were, especially so in light of the fact that for more than four years both Buljubasic and Pavlovic had affected absolute ignorance of the events. More, the prosecutor and the defense counsel had agreed on an "open files" discovery policy, and the prosecutor represented to Judge Grady that the defendants had turned over nothing indicating that there would be a conflict. The most that could be said is that Pavlovic planned to testify that he made a payment to Zabic at Buljubasic's direction and without knowing its purpose—for to admit knowing its purpose would be to confess guilt. Pavlovic's further assertion that he knew that Buljubasic had hired Zabic did not include essential details, such as when Pavlovic learned this information, how he planned to prove it, and what use he intended to make of it at trial.

There is a strong interest in joint trials of those who engaged in a common enterprise. See *United States v. Velasquez*, 772 F.2d 1348, 1352-54 (7th Cir. 1985). Joint trials reduce the expenditure of judicial and prosecutorial time; they reduce the claims the criminal justice system makes on witnesses, who need not return to court for additional trials; they reduce the chance that each defendant will try to create a reasonable doubt by blaming an absent colleague, even though one or the other (or both)

undoubtedly committed a crime. The joint trial gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome. See *United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984). This is not to deny that a joint trial may create a risk that the jury will hear evidence that is inadmissible with respect to one defendant. Inconsistent defenses also may create prejudice. But as a rule evidence and arguments may be controlled by the court, and inconsistent defenses are not enough to require severance. *United States v. Joyce*, 499 F.2d 9, 21 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); *United States v. Hutul*, 416 F.2d 607, 620-21 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970). Finger-pointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact. Unless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants, it is not necessary to hold separate trials. See *United States v. Hendrix*, 752 F.2d 1226, 1232 (7th Cir.), *cert. denied*, 105 S. Ct. 2032 (1985); *United States v. Banks*, 687 F.2d 967, 973 (7th Cir. 1982), *cert. denied*, 459 U.S. 1212 (1983); *United States v. Ziperstein*, 601 F.2d 281, 285 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *United States v. George*, 477 F.2d 508, 515 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973). If Pavlovic should persuade the jury that he gave money to Zabic without knowing its purpose, that would not preclude Buljubasic's acquittal. So as of November 14 it was appropriate to proceed toward the joint trial four days away.

On November 18 Pavlovic renewed his motion for severance. For the first time, counsel for Pavlovic stated that he would raise a defense of compulsion. Counsel said that he would produce evidence "that the reputation of Mr. Buljubasic was one of a dangerous one [sic]; that there were guns present in the room on that day." Judge Crabb, hearing the case by designation, was surprised, for none of the papers in the case mentioned compulsion; the pros-

ecutors were surprised as well and asked the judge to forbid use of the defense, which was not supported by any of the reciprocal discovery or by Pavlovic's testimony on other occasions. The belated nature of the claim led both prosecutor and judge to doubt that it could be sustained. Judge Crabb concluded, however, that Pavlovic's depiction of Buljubasic as a violent thug would require a severance. The court then denied the motion and instructed Pavlovic's counsel to avoid mention of guns or threats in front of the jury until it became clear that (a) Pavlovic would testify to these things, and (b) there was some evidence to support them; intimations from counsel would not be allowed to take the place of evidence.

For the next three days Pavlovic's counsel avoided the subject, and Judge Crabb carefully reduced the jurors' exposure to any conflict that might develop in the defenses. On November 21, out of the jury's presence, Pavlovic's counsel sought permission to ask Zabic whether Buljubasic carried guns. Counsel said he did not know what Zabic would reply. The prosecutor had inquired of Zabic what answer he would give to such a question; Zabic said he would reply that he knew Buljubasic to carry guns but that he did not see a gun on the day Buljubasic told Pavlovic to pay the $9,000 over to Zabic. The judge tried to find out whether Pavlovic's counsel was fishing or whether he really was going to offer a coercion defense. Counsel replied: "it may be duress; . . . . If [the prosecutor] or anyone in this building knows me, I don't tell anyone what my defense will be." Despite this warning, counsel then explained that he planned to use Buljubasic's reputation for carrying guns to explain why Pavlovic turned over the $9,000 knowing what the money was for. This was the first time that Pavlovic or his counsel had conceded knowing the purpose of the payment when it was made. If this concession were made to the jury, only a coercion defense would avoid criminal liability. Judge Crabb continued to doubt that there would be such a defense and restricted counsel's cross-examination of Zabic. The judge allowed counsel to ask Zabic whether

anyone carried weapons at the meeting with Pavlovic but declined to allow Zabic to testify about Buljubasic's reputation or use of guns on other occasions, stating that she would allow such evidence only after Pavlovic had testified that he knew that Buljubasic had a reputation for violence.

The subject stayed off limits through December 6. Judge Crabb precluded Pavlovic's counsel from cross-examining Buljubasic on December 5 about Buljubasic's use of guns. But on December 6, the time had come for Pavlovic to testify. Judge Crabb ruled that Pavlovic could make a coercion defense if his testimony supported it. Yet if Pavlovic so testified, Buljubasic's defense would be irreparably damaged, and if the judge precluded the inquiry, Pavlovic's defense would be destroyed. There remained three possibilities: complete the trial of Buljubasic only, complete the trial of Pavlovic only, or omit the defense. The judge explored the third possibility by requiring Pavlovic to submit to a brief examination out of the jury's presence. Pavlovic testified during this voir dire that he knew the purpose of the payment and gave the money to Zabic only as a result of Buljubasic's threats, including a representation that a goon was waiting outside. Severance was now unavoidable, and the judge asked the prosecutor which case she wanted to complete. She wanted to finish Buljubasic's case, so the judge severed Pavlovic's case and granted a mistrial. The prosecutor then granted Pavlovic use immunity under 18 U.S.C. §6003 and required him to testify against Buljubasic, producing evidence that Buljubasic instructed Pavlovic to pay Zabic and that Pavlovic knew why Zabic was receiving the money. Buljubasic was convicted, and Pavlovic's case was set for a second trial.

II

Pavlovic's pretrial appeal is authorized by *Abney v. United States*, 431 U.S. 651 (1977). Pavlovic contends that the double jeopardy clause bars his retrial because there was not "manifest necessity" for the severance and mistrial. Pavlovic concedes that after his voir dire ex-

amination on December 6 it was evident that one defendant or the other had to be mistried. Pavlovic was the logical one to remove, because Buljubasic had finished his testimony and Pavlovic had not begun. But Pavlovic insists that this is the wrong perspective. The manifest necessity on December 6, he contends, flowed from the erroneous denial of the motions to sever on November 14, 18, and 21. There was no manifest necessity for these errors, the argument concludes, and therefore there is no support for a second trial.

We have already concluded that the denial of the motion on November 14 was not erroneous. Neither was the denial on November 18. A last-minute surprise does not require a court to stop a trial in its tracks, especially when there is substantial doubt that one defendant will make good his threat to conduct an antagonistic defense. Not until November 21 was the extent of the conflict clear, and even then it remained to be seen whether Pavlovic would testify in a way that jeopardized Buljubasic's interests. There are, however, two more general replies.

One is that the double jeopardy clause does not require "manifest necessity" for the events that triggered the mistrial; manifest necessity for the mistrial itself will ordinarily permit a second trial. See *Illinois v. Somerville*, 410 U.S. 458 (1973); *Arizona v. Washington*, 434 U.S. 497 (1978). If Pavlovic's perspective were correct, mistrials caused by prosecutorial or judicial errors could never be followed by second trials, because it is never manifestly necessary to make a mistake. Yet *Somerville* held that a prosecutor's blunder in drafting an indictment supplied manifest necessity for a mistrial. See also *Lee v. United States*, 432 U.S. 23, 33-34 (1977). Often the blunder escapes notice until the trial is over, yet a reversal may be followed by a second trial. See *Burks v. United States*, 437 U.S. 1, 12-15 (1978). If the proceeding is doomed to be reversed, it may be stopped short.

The other reply is that "manifest necessity" is unnecessary when the defendant moves for a mistrial. *United*

States v. Dinitz, 424 U.S. 600 (1976); *Oregon v. Kennedy*, 456 U.S. 667 (1982). Pavlovic moved for severance and mistrial too many times to count. The court finally gave him the relief he sought so avidly, and the double jeopardy clause does not prevent retrial. Only when "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial" (*Oregon v. Kennedy*, 456 U.S. at 679) does the "manifest necessity" standard come into play. Pavlovic does not contend that Judge Crabb or the prosecutor was baiting him into moving for a mistrial or sabotaging his defense until there was no other alternative. Their conduct was entirely above board, and an argument that they were trying to undermine a successful defense in order to have a better crack the second time would be ludicrous. Pavlovic's motions for mistrial started at the beginning of trial.

Pavlovic replies that he hadn't moved for mistrial lately, so the severance and mistrial of December 6 must be assessed as one on the court's own motion. The premise is true, but the conclusion does not follow. Pavlovic had been insisting on severance all along. The judge said she was granting Pavlovic's pending motion. When the judge finally proposed to give Pavlovic what he sought, Pavlovic did not tell the judge that he had changed his mind. The court was entitled to treat this as a consensual mistrial.

Pavlovic cites cases such as *United States v. Jorn*, 400 U.S. 470 (1971), and *United States ex rel. Clauser v. McCevers*, 731 F.2d 423, 426 (7th Cir. 1984), holding or implying that when a judge surprises counsel by a declaration of mistrial, the failure to object cannot be taken as consent. *Jorn* was the classic case of the overbearing judge, and *Clauser* one in which the mistrial was designed to rescue the prosecutor from a bad turn of events. Neither *Jorn* nor any other case holds that just because the *suggestion* of mistrial comes from the judge initially, the defendant's acquiescence is irrelevant. Parties may give assent in many ways. If a judge should say: "I think a mistrial would be a good idea, but think this over and

let me know if you disagree", the defendant's silence would be assent. The principal functions of the double jeopardy clause are to allow a defendant to get a verdict at the first trial if he wants one and to keep a verdict that is favorable. *United States ex rel. Young v. Lane*, 768 F.2d 834, 837 (7th Cir.), *cert. denied*, 106 S. Ct. 317 (1985). Whether the defendant wants a verdict is something he knows best, and when the occasion for choice comes he must choose unless, as in *Jorn*, the judge brooks no opposition, or unless there is insufficient time to deliberate. In *Clauser* things were going the defendant's way, making an inference of assent from silence implausible. Here Pavlovic's defense had been hampered throughout the trial. He had ample time to deliberate. His choice was clear—he made many motions for mistrial and did not retract them or express concern when the judge finally granted the mistrial. The process took more than an hour on December 6, so there was ample time. Pavlovic had only to withdraw his motion and say that he wanted to finish the trial. He did not, so this must be taken as a mistrial on his motion.

Pavlovic tries to distinguish *Dinitz* and *Kennedy* on the ground that this mistrial really was granted for Buljubasic's benefit. Yet he never asked the judge [illegible] mistry Buljubasic's case and proceed to judgment on his own. Had he done this, we doubtless would have Buljubasic's double jeopardy appeal instead of Pavlovic's. This is why it does not matter that Judge Crabb asked the prosecutor which case should be completed. One or the other had to stop, both defendants had made mistrial motions, and from the perspective of the double jeopardy clause it does not matter which defendant is retried. Finally, it does not matter that Pavlovic testified on voir dire before the court granted the mistrial. This is less of a "preview" of the defense than the prosecutor would have had if Buljubasic's case had been mistried (for Buljubasic had completed his testimony), and less than the prosecutor gets when a case is completed, reversed, and retried. Pavlovic saw the prosecutor's whole case; previews are mutual. There is no sug-

gestion that either the court or the prosecutor elicited the testimony in order to gain an unnecessary preview of the evidence. The double jeopardy concern is not that the parties learn each other's evidence but that the defendant loses the opportunity to obtain a verdict that may be favorable. Pavlovic surrendered his opportunity to obtain a verdict from the jury then empaneled, which is a sufficient answer to his double jeopardy contentions.

III

Zabic testified that Buljubasic hired him to find an arsonist to damage the apartment building. Zabic gave extensive details of conversations, of engaging Siprak and hiring Samuelson, of buying gasoline with Buljubasic, of Buljubasic's giving money to Pavlovic to hold until the job was done. Zabic also testified that Buljubasic helped finance Samuelson's defense and found a lawyer to handle Zabic's own appeal. He described the flight to Florida with Siprak and Howard Vess (who had a minor role in the events); in Florida the trio stayed at a motel owned by one of Buljubasic's business associates. Vess supported the story. Pavlovic testified under a grant of immunity that he received $9,000 from Buljubasic and paid the money to Zabic at Buljubasic's demand, after Buljubasic identified the purpose of the payment. Diane Siprak testified that she heard her husband, Zabic, and Vess refer repeatedly to the job being done for "Ivan the owner", and she participated in some of the collateral events of the plot. The dilapidated condition of the building, the insurance for substantially more than the building's value, and Buljubasic's efforts to remove all tenants from the building support the tale the witnesses told. All in all, the evidence against Buljubasic was quite strong.

The power of the case against Buljubasic saps the strength of his claim that the joint trial was prejudicial. The court kept out all evidence that would have unfairly prejudiced Buljubasic and even prevented Pavlovic's counsel from intimating that Buljubasic may have coerced Pavlovic into cooperating. This reduces Buljubasic to general

complaints about having a viper in the defense camp. Doubtless Pavlovic's lawyer focused the jury's attention on any evidence that inculpated Buljubasic and not Pavlovic, but the evidence was there no matter what counsel made of it. See *Ziperstein*, 601 F.2d at 288. Most of what Pavlovic's lawyer did is common in joint trials. The interests of the defendants—Pavlovic's coercion defense to one side—largely overlapped. Zabic inculpated both Pavlovic and Buljubasic; both defendants wanted to destroy Zabic's credibility and undermine evidence that supported Zabic's story. Buljubasic's greatest beef is that Pavlovic's lawyer cross-examined Buljubasic sarcastically. No surprise that he did this. Buljubasic alone claimed ignorance. He heard nothing, saw nothing, knew nothing. After Buljubasic denied knowing who burned the building, Pavlovic's lawyer asked him: "You don't know whether Bozo the Clown burned down the building either, do you?" Pavlovic's lawyer had been sarcastic with other witnesses, too, and sarcasm did not add to the evidence already in the lists against Buljubasic. Most of the tactics of Pavlovic's lawyer passed without objection; the rest were handled well by Judge Crabb; the residual effects were well within the tolerable range. See *United States v. Tanner*, 471 F.2d 128, 137 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972).

IV

Of Buljubasic's plenitudinous claims of error, only four more require discussion.

1. Diane Siprak testified that she heard several of the conspirators say that they were doing the job for "Ivan the owner". She corroborated other details. The district court told the jury to evaluate the testimony of many witnesses with caution because they were accomplices; it did not give an accomplice instruction concerning Diane Siprak's testimony. The prosecutor defends this decision, arguing that Diane Siprak did not have the criminal intent necessary to be an accomplice. She was involved in the criminal affairs, however, and it is rarely fruitful to

draw fine lines among those implicated in the crime when deciding whether to give accomplice instructions. The failure to give such an instruction with respect to Diane Siprak allowed the prosecutor to portray her as an especially reliable witness; maybe she was, maybe she wasn't, but the power of testimony should not be enhanced by nice distinctions that underlie cautionary instructions to the jury. Still, if it was error to omit the instruction, the mistake was harmless. See *United States v. Lane*, 106 S. Ct. 725, 730-32 (1986). The court told the jury to take each witness's interest into account in evaluating the testimony, and Diane Siprak's interest in avoiding prosecution had been made known. She was cross-examined fully, and it is impossible to believe that additional instructions telling the jury to treat interested testimony with caution would have affected the outcome of this trial.

2. Buljubasic depicted one of the encounters between himself and Zabic as an effort by Zabic to extort money. The prosecutor asked why Buljubasic had not gone to the police to protest the extortion; Buljubasic answered that by the time of the events in question, he had been identified as a suspect and did not believe that the police would believe anything he said. After a recess, Buljubasic's lawyer objected to this sequence on the ground that Buljubasic was relying on his constitutional right to remain silent. He invoked *Doyle v. Ohio*, 426 U.S. 610 (1976). Buljubasic had talked with officials on several occasions and had been given *Miranda* warnings, and his lawyer depicted his failure to report the extortion as a reliance on the warnings. The district court concluded that the warnings were too remote to support such reliance; the last one had been received more than a year before Zabic's supposed effort to extort money from Buljubasic. On top of that, Buljubasic had talked freely with officials each time he had received the warnings. Because he did not invoke his right to remain silent, the principle of *Doyle* is inapplicable. See *Phelps v. Duckworth*, 772 F.2d 1410, 1412-13 (7th Cir.) (en banc) (collecting cases), *cert. denied*, 106 S. Ct. 541 (1985).

The district court also prevented Buljubasic from stating to the jury that he relied on the *Miranda* warnings in failing to report Zabic's supposed activities. This restriction was permissible under Fed. R. Evid. 403. Buljubasic proposed to give a cumulative explanation for his conduct. One set of warnings Buljubasic received was accompanied by ethnic slurs from a police officer, and the district judge was entitled to believe that the real purpose of raising the line of argument was to receive sympathy by placing the slurs before the jury. This whole episode was collateral, and Rule 403 allows the exclusion of such detours and excursions.

3. Zabic was impeached by evidence that for years he had denied talking with Buljubasic about the arson. He inculpated Buljubasic only after receiving immunity. He conceded that he talked to his lawyer about the effect the grant of immunity would have on a potential prosecution for perjury for the earlier denials of Buljubasic's involvement. He testified that the attorney sent him a letter with the information that his sentence had been reduced (apparently on account of cooperation) and had informed him that he could be prosecuted for lying under oath in response to the grant of immunity. He invoked the attorney-client privilege with respect to the content of these and other communications, however, and Judge Crabb sustained the claim of privilege.

This decision is correct. A client does not waive the privilege by stating facts that outsiders already know or could deduce. Only revelation of portions of communications that are private between attorney and client waives the privilege concerning the residue of the communication. See *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983). The reduction in Zabic's sentence was a matter of public knowledge; revealing that he was told about it does not waive any privilege concerning the contents of the communication. Similarly, the grant of immunity was public, and disclosing that counsel relayed advice from the judge in open court does not require the witness to lay bare the full communication, which may contain secrets and strategic discussions.

4. Ivan Siprak was the only non-testifying conspirator. Although he was serving a sentence after his plea of guilty to the substantive offenses, he invoked his privilege against self-incrimination, apparently because he feared that truthful testimony might set up a prosecution for earlier perjury. The prosecutor declined to give Ivan Siprak immunity from prosecution. Buljubasic contends that this requires a reversal of his conviction. But the obstacle to Siprak's testimony came from the Constitution itself, and we have never held that the due process clause of the Constitution requires prosecutors to overcome obstacles established by the self-incrimination clause. Although we have on occasion intimated that should selective grants of immunity produce egregiously lopsided access to evidence the price of immunity at the prosecutor's behest may be immunity at the defendant's, see *United States v. D'Antonio*, 801 F.2d 979, 982-83 (7th Cir. 1986) (collecting cases), we have never so held. At all events there was nothing lopsided about the presentation of evidence here. Every important character other than Ivan Siprak testified, and many peripheral characters did so too. Buljubasic had a fair trial.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 2, 1987

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA	) Appeal from the) United States) District
Plaintiff-Appellee	) Court for the) Northern District
No. 86-1263 vs.	) of Illinois,) Eastern Division.
IVAN BULJUBASIC	) No. 84 CR 752
Defendant-Appellant.	) Barbara B. Crabb,) Judge

ORDER

Defendant-appellant filed a suggestion of rehearing en banc (without a petition for rehearing) on January 21, 1987. No judge in regular active service has requested a vote on the suggestion of rehearng en banc. The suggestion of rehearing en banc is DENIED.

Supreme Court, U.S.
FILED
MAY 11 1987
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No. 86-1608

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IVAN BULJUBASIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO
PETITION FOR WRIT OF CERTIORARI
PURSUANT TO RULE 22.6

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Petition for Writ of Certiorari was timely filed.

The Clerk of the United States Supreme Court has indicated there is an issue whether the Petition for Writ of Certiorari was timely filed. The purpose of this Supplement to the Court is to address that question.

The Seventh Circuit affirmed on January 7, 1987. Within fourteen days--on January 21, 1987--petitioner filed a Petition for Rehearing En Banc. Attached hereto as Exhibit 1 is the cover page of such Petition and the inside cover. This filing of the Petition for Rehearing En Banc was timely under Rule 40 of the United States Court of Appeals for the Seventh Circuit (formerly Circuit Rule 16). It also met the requirements of Federal Rule of Appellate Procedure Rule 35. The document was entitled "Petition for Rehearing En Banc."

On February 2, 1987, the United States Court of Appeals for the Seventh Circuit denied the Petition for Rehearing. This Petition for Writ of Certiorari was mailed to the Court with an appropriate affidavit of mailing pursuant to Rule 28

on April 2, 1987, and under the rules of this Court would be deemed timely filed.

An issue was raised by the Clerk of this Court because the Order of the Seventh Circuit denying the Petition for Rehearing, for some reason absolutely incomprehensible to counsel and to the clerking staff of the Seventh Circuit Court of Appeals, indicates that a suggestion for rehearing en banc (without a petition for rehearing) was filed. The order reads:

> "Defendant-appellant filed a suggestion of rehearing en banc (without a petition for rehearing) on January 21, 1987. No judge in regular active service has requested a vote on the suggestion of rehearing en banc. The suggestion of rehearing en banc is DENIED."

Federal Rules of Appellate Procedure, Rule 35(c) reads in part:

> "A suggestion for rehearing en banc must be filed within the time

> prescribed by Rule 40 for filing petitions for rehearing, whether the suggestion is made in such petition or otherwise."

The notes of the Advisory Committee on Appellate Rules, Federal Rules of Appellate Procedure, Rule 35 state at full paragraph three thereof:

> "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides."

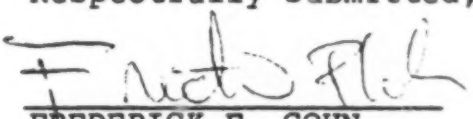
Clearly, the filing involved here was in fact a Petition for Rehearing, with a suggestion that the case be reheard in

banc. The language of the Advisory Committee note makes clear that the inclusion of a suggestion in a Petition does not compromise the status of the underlying Petition for Rehearing. Counsel is not required, at his peril, to make a clear distinction between Petition and Suggestion, in order to retain the effect of the Petition.

Clearly, under the rules, and even more clearly under the Advisory Committee notes to Rule 35, a suggestion for rehearing can be made within a petition for rehearing. The order of the Seventh Circuit indicating that no petition for rehearing was filed is, in the face of the documents which were filed with the Clerk of the Seventh Circuit, an absolute misstatement.

This Court should not deem the language of the order denying the Petition to be the basis for finding that the Petition for Writ of Certiorari was not filed in adequate time.

Respectfully submitted,



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EXHIBIT 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1263

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

IVAN BULJUBASIC,

Defendant-Appellant.

Appeal from the United States
District Court,
Northern District of Illinois,
Eastern Division.

Honorable Barbara Crabb, Presiding.

PETITION FOR REHEARING EN BANC

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1263

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

IVAN BULJUBASIC,

Defendant-Appellant.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division.

Honorable Barbara Crabb, Presiding.

PETITION FOR REHEARING EN BANC

INTRODUCTORY STATEMENT

The reason this Court should order a rehearing en banc is because: (1) The Court of Appeals applied an inapplicable

standard--one applicable to a situation where the nature of the antagonistic defenses do not require a severance, to the situation here where a severance had to be and was granted and prejudice occurred to defendant because the district court did not grant the severance when prior to trial it was advised of the basis for the severance, but instead waited until after the

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(3)

No. 86-1608

In the Supreme Court of the United States

OCTOBER TERM, 1986

IVAN BULJUBASIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because a co-defendant's motion for severance was not granted until late in the trial.

2. Whether the district court properly permitted evidence and closing argument regarding petitioner's failure to report an alleged extortion attempt to law enforcement authorities.

3. Whether the district court properly refused to grant immunity to a prospective defense witness.

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In the Supreme Court of the United States

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No. 86-1608

IVAN BULJUBASIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 808 F.2d 1260.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1987. A suggestion for rehearing en banc was denied on February 2, 1987 (Pet. App. 16). The petition for a writ of certiorari was filed on April 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] The court of appeals determined that petitioner's en banc request, which was captioned "Petition for Rehearing En Banc," constituted "a suggestion of rehearing en banc (without a petition for rehearing)" (Pet. App. 16). The petition for a writ of certiorari would therefore appear to be out of time under Rule 20 of the Rules of this Court.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to commit mail fraud and to destroy a building by fire or explosive, in violation of 18 U.S.C. 371; on three counts of attempting to destroy a building by fire or explosive, in violation of 18 U.S.C. 844(i); and on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three concurrent ten-year terms of imprisonment on the explosive violations, to be followed by a two-year term of imprisonment on one of the mail fraud counts. He was also placed on probation for five years and was ordered to pay a total of $41,000 in fines and $4,200 in restitution to a victim of the offense.

1. The evidence at trial showed that petitioner acquired a Chicago apartment building through Slobodan Pavlovic, the owner of a real estate company. Through the assistance of Ilija Zabic, petitioner hired Ivan Siprak and Robert Samuelson to set fire to the building. Petitioner instructed Pavlovic to pay Zabic, Siprak, and Samuelson once the arson was completed. Samuelson set the building on fire, Pavlovic paid $9,000 to Zabic and Siprak, and petitioner filed insurance claims for the resulting damage. The police eventually apprehended all of the participants in the scheme. Pet. App. 1-2.

2. Petitioner and Pavlovic were indicted together and their cases were joined for trial. See Fed. R. Crim. P. 8(b).[2] On November 6, 1985 (13 months after indictment and 12 days before trial), Pavlovic moved for a severance on the ground that he and petitioner expected to maintain inconsistent defenses. The district court determined that

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[2] Prior to petitioner's trial, Zabic was convicted of arson and Samuelson and Siprak pleaded guilty to the charge of attempted arson.

Pavlovic had failed to show that his defense would conflict with petitioner's. The court therefore denied the severance motion. Pet. App. 2-4.

On November 18, 1985, Pavlovic renewed his severance motion, suggesting to the court for the first time that he would allege that petitioner coerced him, through threats of violence, to pay Zabic and Siprak for their efforts in connection with the arson. The court indicated that a severance would be necessary in the event that Pavlovic offered evidence of compulsion, but in light of Pavlovic's refusal to commit himself to a compulsion defense at that point, the court denied the severance motion pending further developments. In the meantime, in order to avoid any prejudice to petitioner, the court instructed Pavlovic to avoid any reference to his defense of compulsion in the presence of the jury until it became clear that he would provide evidence supporting that theory. Pet. App. 5-6.

After two weeks of trial, Pavlovic stated to the court under oath, outside the jury's presence, that he would testify that petitioner coerced him into engaging in the arson scheme. At that point, the court determined that a severance was warranted; the court therefore declared a mistrial with respect to Pavlovic and proceeded with the trial against petitioner alone. The prosecutor then granted Pavlovic use immunity under 18 U.S.C. 6003, and Pavlovic testified that petitioner instructed him to pay Zabic for the arson. The jury convicted petitioner, and Pavlovic's case was set for a new trial. Pet. App. 7.

The court of appeals affirmed petitioner's conviction. It found that it was proper for the district court to grant the severance when it did and that, in light of the protective measures ordered by the district court, conducting a joint trial up to the time of the severance did not prejudice petitioner. The court also found that there was no merit to petitioner's claims regarding the admission of certain

evidence at trial and regarding the government's refusal to grant immunity to a proposed defense witness who refused to testify at trial. Pet. App. 7-15.

ARGUMENT

1. Petitioner contends (Pet. 19) that the court of appeals' standard "for determining the degree and nature of antagonistic defense which requires a severance" conflicts with the standard employed by the Fifth Circuit. That contention is incorrect.

The court of appeals stated that a severance is not required "[u]nless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants" (Pet. App. 5 (emphasis in original)). The Fifth Circuit applies a virtually identical standard, stating that "severance is required only when the defense of one party, if believed, necessarily indicates the guilt of the other. In other words, the defenses must be 'more than merely antagonistic—they must be antagonistic to the point of being mutually exclusive.' " *United States* v. *Holcomb*, 797 F.2d 1320, 1324 (1986) (citations omitted). See also *United States* v. *Fortna*, 796 F.2d 724, 738 n.13 (5th Cir. 1986), cert. denied, No. 86-587 (Nov. 10, 1986); *United States* v. *Stotts*, 792 F.2d 1318, 1321 (5th Cir. 1986). Thus, there is no conflict between the Seventh Circuit and Fifth Circuit standards.[3]

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[3] Petitioner's statement that "the Fifth Circuit standard does not require that the antagonism be mutually exclusive" (Pet. 20) is plainly incorrect. In *United States* v. *Romanello*, 726 F.2d 173 (1984), the one Fifth Circuit case on which petitioner relies (Pet. 20-23), that court embraced precisely that standard. See 726 F.2d at 177 ("To compel severance the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive.").

Petitioner also contends that the decision of the Seventh Circuit conflicts with decisions of several state courts with regard to the proper standard to apply in determining whether a severance should be granted based on a claim of antagonistic defenses. In the first place, the question whether a severance should be granted in a particular setting is ordinarily a matter of non-constitutional criminal procedure on which the states are free to adopt rules at variance with the rules applied in the federal system. A difference in approach between state and federal courts on such an issue should therefore be no source of concern to this Court. Beyond that, however, we discern no conflict between the decison in this case and the four state court decisions cited by petitioner. Two of those state court decisions expressly adopted a standard indistinguishable from the one applied by the court in this case. See *Commonwealth* v. *Moran*, 387 Mass. 644, 659, 442 N.E.2d 399, 408 (1982) (severance granted when defenses were "mutually antagonistic and irreconcilable"); *State* v. *Clarke*, 448 A.2d 1208 (R.I. 1982) (severance granted "if [the] conflict between [the] defenses is real and substantial and of such an irreconcilable nature that it is likely [the] jury will infer guilt on [the] basis of [the] conflict alone"). The other two state court decisions use more general language, but do not employ a standard that is discernibly different from the one employed by the Seventh Circuit. See *People* v. *Byron*, 116 Ill. 2d 81, 506 N.E.2d 1247 (1987) ("Severance is required where the defenses of codefendants are so antagonistic that severance is imperative to insure a fair trial."); *State* v. *Webb*, 424 So.2d 233 (La. 1982) (severance required when one defendant "intends to lay blame for the offense at the feet of [the] codefendant").

In any event, a severance was granted in this case as soon as it became clear that Pavlovic's defense would conflict with petitioner's. Petitioner argues (Pet. 23-31) that he was prejudiced by the district court's decision to

postpone granting a severance until it became clear that Pavlovic would present a conflicting defense. As the court of appeals' analysis shows, however, there is no merit to that claim.

This Court has recognized that society has a strong interest in prosecuting criminal cases through joint trials. *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 9-10; *United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 10. Once it is established that joinder is proper—as it plainly was here—trial courts exercise substantial discretion in determining whether a joint trial is appropriate in a particular case. See Fed. R. Crim. P. 14; *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Watkins*, 811 F.2d 1408, 1410 (11th Cir. 1987); *United States* v. *DiPasquale*, 740 F.2d 1282, 1293 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985). The trial court acted properly here in continuing with the joint trial until it became clear that a severance would be necessary.

Throughout the period that the joint trial continued, the district court took steps to protect petitioner from undue prejudice, while at the same time properly refusing to grant a severance based solely on Pavlovic's unsupported representation that the defenses would conflict. As the court of appeals observed (Pet. App. 4), during the four years prior to the trial, both petitioner and Pavlovic "affected absolute ignorance of the events." Even as of the time of Pavlovic's severance motion on November 14, 1985, Pavlovic's position seemed to be that he made a payment to Zabic at petitioner's request, but that he did not know the purpose of the payment—a defense that was not at all irreconcilable with petitioner's defense of complete ignorance of the arson (see *ibid.*).

It was not until November 18 that Pavlovic first suggested that he would raise a defense of compulsion and that in support of that defense he would offer evidence that petitioner had a reputation as a dangerous person

who carried firearms (Pet. App. 5). In light of the belated nature of Pavlovic's claim, the district court justifiably expressed skepticism that Pavlovic's proposed defense would be supported by any evidence. The court's skepticism was especially justified because, even after November 18, petitioner's counsel refused to commit himself to a coercion defense. *Id.* at 6. Because it was not yet clear, even from Pavlovic's counsel, whether Pavlovic would ultimately choose to rely on that defense, the district court properly refused to grant a severance at that time. Instead, the court took steps to avoid any possible prejudice to petitioner by forbidding Pavlovic from making any reference to petitioner's reputation, his practice of carrying firearms, or his conduct in coercing Pavlovic to participate in the offense, until it became clear that Pavlovic would testify or offer some other evidence to support his defense of compulsion. *Id.* at 6-7.

Not until December 6, 1985, two weeks into the trial, did Pavlovic commit himself to relying on the defense of compulsion. At that point Pavlovic made his sworn statement outside the presence of the jury in which he claimed that petitioner forced him to make an arson payment to Zabic. Based on that statement, the district court granted a severance.

For the district court to have granted a severance any earlier would have been improvident. To grant a severance on the basis of a defendant's representation that he might raise a defense that would be inconsistent with some other defendant's defense would invite manipulation and result in a large number of unjustified severances. Rather than granting a severance that might well have turned out to be unnecessary, the district court wisely delayed granting the severance but in the interim took steps to avoid any prejudice from the potential conflict between the positions of the two defendants. As the court of appeals noted, the district court "kept out all evidence that would have un-

fairly prejudiced [petitioner] and even prevented Pavlovic's counsel from intimating that [petitioner] may have coerced Pavlovic into cooperating" (Pet. App. 11).

Although petitioner contends that he was prejudiced by the joint trial prior to the time the severance was granted, he does not make a convincing showing to support his claim. His principal complaint is that Pavlovic's attorney conducted a searing cross-examination of petitioner that was far more effective than the cross-examination conducted by the government (Pet. 24-29). In fact, although Pavlovic's counsel cross-examined petitioner in a sarcastic manner (Pet. App. 12), that was hardly enough to establish conflicting defenses or to prejudice petitioner irreparably in the eyes of the jurors. As the court of appeals noted, Pavlovic's lawyer was sarcastic with other witnesses too, and his "sarcasm did not add to the evidence already in the lists against petitioner" (*ibid.*).

Petitioner also complains (Pet. 15-16) of other respects in which Pavlovic's counsel buttressed the government's case against petitioner. In each of those instances, however, Pavlovic's counsel was simply underscoring the evidence against petitioner in order to minimize his own client's role in the offense, a tactic that is not unusual in joint trials and that does not rise to the level of mutually exclusive or irreconcilable defenses that require a severance. See *United States* v. *Paradis*, 802 F.2d 553, 561-562 (1st Cir. 1986); *United States* v. *DeLuna*, 763 F.2d 897, 921 (8th Cir.), cert. denied, 474 U.S. 980 (1985); *United States* v. *Hendrix*, 752 F.2d 1226, 1232 (7th Cir.), cert. denied, 471 U.S. 1021 (1985); *United States* v. *Becker*, 585 F.2d 703, 707 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Ehrlichman*, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977); *United States* v. *Barber*, 442 F.2d 517, 530 (3d Cir.), cert. denied, 404 U.S. 958 (1971).

Finally, as the court of appeals noted, the case against petitioner was quite strong.[4] Accordingly, any prejudice petitioner might have suffered from Pavlovic's cross-examination of him or of any of the government's witnesses could not have affected the outcome of the trial, and thus was not sufficient to render the district court's handling of the severance requests an abuse of discretion.

2. Petitioner next contends (Pet. 32-39) that the government improperly impeached his trial testimony. Petitioner testified that, two years after the arson, Zabic attempted to extort money from him (Pet. App. 13). On cross-examination, petitioner admitted that he had failed to notify the police of the extortion attempt. He explained his failure to do so on the ground that he was a suspect in the arson investigation and he expected that the police would not believe him (*ibid.*).

This Court has held that the Due Process Clause prohibits the government from administering *Miranda* warnings and then using the defendant's post-arrest silence to impeach the defendant's exculpatory testimony at trial. *Doyle* v. *Ohio*, 426 U.S. 610 (1976). But the principles of *Doyle* cannot be extended to a case such as this one, where a defendant claims to have been a victim of a separate, subsequent crime, and the government seeks to impeach that claim by showing that the defendant failed to report the alleged crime against him. A defendant who has once been given *Miranda* warnings in connection with a police interview is not thereafter forever immunized from impeachment by his silence in connection with a wholly separate matter.

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[4] In addition to the direct evidence given by Zabic, Pavlovic, and Samuelson, there was corroborative testimony from two other witnesses. Moreover, the dilapidated condition of the building, the obtaining of insurance for substantially more than the value of the building, and petitioner's efforts to remove all the tenants from the building before the arson provided strong circumstantial support for the direct evidence of petitioner's guilt (see Pet. App. 11).

Petitioner's failure to report the alleged extortion attempt logically supports the inference that the extortion did not take place, and there is nothing unfair about allowing the government to ask the jury to draw that inference. In addition to the fact that the alleged extortion by Zabic was an entirely separate crime from the arson, it was a crime in which petitioner claimed to be the *victim*. Moreover, petitioner was last given *Miranda* warnings more than a year before the extortion supposedly took place, and even at that time petitioner had not invoked his right to remain silent, but had freely discussed the arson allegations with the police (Pet. App. 13).[5]

Petitioner makes the related contention that it was improper for the district court to bar him from testifying that the reason he did not report the Zabic extortion in 1983 was that he was relying on the *Miranda* warnings he received in 1981 and 1982. As the court of appeals noted (Pet. App. 14), the district court properly barred petitioner from giving that explanation because the apparent purpose of offering that testimony was to evoke sympathy by offering into evidence an ethnic slur from a police officer that had accompanied one of the *Miranda* warnings petitioner had received. In any event, even if the district court was incorrect in barring the evidence regarding the *Miranda* warnings, the error was inconsequential, since petitioner was permitted to explain that the reason he did not report Zabic's extortion attempt was that he had been told as early as 1981 that he was a suspect in the arson investigation (see Tr. 2314). Thus, petitioner was able to give essentially the same explanation for his conduct that he would have given if he had been permitted to refer expressly to the *Miranda* warnings: that he did not tell the

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[5] Because petitioner did not invoke his right to remain silent, but instead spoke freely with the police, this case is more akin to *Anderson* v. *Charles*, 447 U.S. 404 (1980), than to *Doyle*.

police about the extortion attempt because, still being a suspect in the arson investigation, he did not think the police would believe him. In light of the collateral nature of the inquiry into the extortion matter and the limited scope of the district court's restriction on petitioner's testimony, petitioner could not have been prejudiced by the district court's order barring reference to the *Miranda* warnings.

3. Finally, petitioner contends (Pet. 39-41) that the trial court should have granted use immunity to Ivan Siprak after Siprak invoked his privilege against compulsory self-incrimination and declined to testify as a defense witness.

A United States Attorney may request an order for witness immunity when "the testimony * * * from such individual may be necessary to the public interest" and the witness has refused to testify on the basis of his privilege against compulsory self-incrimination. 18 U.S.C. 6003. This Court has never recognized the existence of judicial authority to immunize defense witnesses absent a request from the government. Rather, the Court has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). See *id.* at 253-254. The corollary of this principle is that "[n]o court has authority to immunize a witness" (*id.* at 261; see *id.* at 262). See also *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984) ("Congress expressly left this decision exclusively to the Justice Department."). Following these principles, the courts of appeals have overwhelmingly ruled that judges may not immunize defense witnesses without a request from the prosecution.[6]

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[6] See, *e.g.*, *United States* v. *Whittington*, 783 F.2d 1210, 1219-1220, on reh'g, 786 F.2d 644 (5th Cir. 1986), cert. denied, No. 85-1974

Prior to this Court's decisions in *Doe* and *Conboy*, the Third Circuit held that a district court may immunize a defense witness when that witness has essential, exculpatory information that is unavailable from other sources. See *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980). Whatever the validity of the Third Circuit's rule, it is applicable by its terms only when the defendant makes "a convincing showing" that the proffered testimony is "both clearly exculpatory and essential to the defendant's case" (*id.* at 972). In addition, "[i]mmunity will denied if the proffered testimony is found to be * * * cumulative" (*ibid.*). The Third Circuit thus has found a judicial grant of immunity appropriate only when there is "a probable certainty that * * * [the] expected testimony * * * would * * * *in itself* exonerate [the defendant]." *United States* v. *Lowell*, 649 F.2d 950, 965 (1981) (emphasis in original). See also *United States* v. *Steele*, 685 F.2d 793, 808 (3d Cir.), cert. denied, 459 U.S. 908 (1982).[7]

(Oct. 14, 1986); *United States* v. *Pennell*, 737 F.2d 521, 526-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Mendia*, 731 F.2d 1412, 1414-1415 (9th Cir.), cert. denied, 469 U.S. 1035 (1984); *United States* v. *Gottesman*, 724 F.2d 1517, 1524 (11th Cir. 1984); *United States* v. *Bounos*, 693 F.2d 38, 39 (7th Cir. 1982); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1336 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976).

[7] The Third Circuit has also held that the Due Process Clause may require a grant of use immunity to a defense witness if the prosecutor, through selective use of immunity, has deliberately distorted the judicial fact-finding process. *United States* v. *Bazzano*, 712 F.2d 826, 839-840 (1983) (en banc), cert. denied, 465 U.S. 1078 (1984); *United States* v. *Lowell*, 649 F.2d 950, 964-965 (1981); see also *United States* v. *D'Antonio*, 801 F.2d 979, 982-983 (7th Cir. 1986). As the court of

Although the Third Circuit's approach to the issue is different from that of other circuits, there is no need for the Court to address that difference in this case. First, the Third Circuit has yet to determine whether its recognition of judicial immunity survives this Court's remarks in *Doe* and *Conboy*. In light of those intervening decisions, the Third Circuit may reconsider its analysis of the issue of defense witness immunity. Second, petitioner has not demonstrated that he would have obtained a favorable ruling on his request to immunize Siprak even in the Third Circuit, because petitioner failed to show that if Siprak were immunized, he would give testimony that clearly exculpated petitioner.

Contrary to petitioner's assertion, the record does not reflect that Siprak's testimony would have been helpful to petitioner. At trial petitioner predicted that Siprak would testify that petitioner was not present on one occasion when Siprak and Zabic went to Pavlovic's office to collect money for the arson from Pavlovic. That prediction was based on two statements Siprak had previously made to investigators. The statements, however, were inconsistent with one another in important respects. In addition, the statements were inconsistent with the accounts of that meeting given by both Zabic and Pavlovic at trial, and the statements were made in the course of an account by Siprak that was apparently designed to minimize his culpability in the arson scheme. See Gov't C.A. Br. 43-46. Moreover, other portions of Siprak's prior statements were damaging to petitioner, and testimony from him on those subjects would not have been helpful to petitioner's defense. For example, in one of his pretrial statements, Siprak said that he had overheard Zabic talking with Pavlovic about getting money from petitioner, and in

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appeals noted (Pet. App. 15), in this case all the significant participants in the arson scheme other than Ivan Siprak testified at trial. There was therefore "nothing lopsided about the presentation of evidence here" (*ibid.*).

another statement, Siprak said that Zabic had told him Pavlovic was holding funds to be paid to Zabic at petitioner's direction. See *id.* at 43-45. Accordingly, far from providing clearly exculpatory evidence, the effect of immunizing Siprak, in all likelihood, would have been to strengthen the case against petitioner. In these circumstances, it was not error for the district court to decline to compel the government to seek an order of immunity for Siprak so that he could be forced to testify as a defense witness at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 86-1608

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IVAN BULJUBASIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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(a) The rule of law that justifies a denial of a severance is not applicable and cannot excuse the prejudice to petitioner, where a severance had to be granted; and the delay in granting the severance resulted in prejudice to the petitioner by permitting counsel for co-defendant to cross-examine petitioner and other witnesses. 2

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1.

Petitioner was denied his constitutional right to due process and a fair trial when the court forced him to proceed to trial with co-defendant Pavlovic, where that co-defendant asserted prior to trial that petitioner had threatened to use deadly force to coerce him to assist in the offense, where at trial co-defendant's opening statement affirmed this defense, and where counsel for co-defendant through his cross-examination of witnesses including

petitioner and presenting witnesses acted as an associate prosecutor whose strategy was designed to prove to the jury that petitioner was guilty.

(a) The rule of law that justifies a denial of a severance is not applicable and cannot excuse the prejudice to petitioner, where a severance had to be granted; and the delay in granting the severance resulted in prejudice to the petitioner by permitting counsel for co-defendant to cross-examine petitioner and other witnesses.[1]

A main thrust of the government's position is that prejudice to Buljubasic was not caused by the government and hence not error. Instead, they argue it was caused by the dilatory tactic of Pavlovic in waiting "for nearly a year after indictment before filing his severance motion" (Govt. Br. 18) that

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1. The government's reliance on Pavlovic's credibility is strange. Relative to this case, Pavlovic has pled guilty to having committed perjury.

asserted that Buljubasic coerced him to provide funds to Zabic. While such argument would be persuasive if Pavlovic was appealing, it lacks force when used to excuse the harm to Buljubasic. He was not dilatory. He had no way of knowing what fabrication Pavlovic would make. He had no control over his co-defendant. It is harsh, as well as so illogical as to violate due process, to make Buljubasic suffer prejudice due to the failure of a co-defendant to come forward with his concocted defense until immediately before trial.

On November 18, 1985, before trial, Pavlovic's attorney stated that Pavlovic would testify that Buljubasic by threatening him with guns coerced him to provide "arson money to pay Mr. Zabic." (App. A4, Tr. 1) The government argued

that Pavlovic should be prohibited from making this defense because it was being raised immediately prior to trial. The court disagreed, ruling that she would not "preclude raising that defense." (App. A4, Tr. 2-3) Although Pavlovic's attorney, in response to inquiry as to whether Pavlovic would testify, specifically advised the court that "Mr. Pavlovic is taking the stand." (App. A4, Tr. 6), the court denied the motion for severance. The motion was denied even though the court recognized that if Pavlovic presented his testimony as to coercion, "that would require a severance because that is definitely a defense ... incompatible with Mr. Buljubasic's defense." (Tr. 802) Hence, prior to the commencement of trial, the court was

advised of the very facts that ultimately caused the court to grant a severance.

The government claims that while the assertion of Pavlovic's defense counsel was a "representation of potentially 'antagonistic defenses'" (Govt. Br. 20) the judge had a right to disbelieve that such a defense would be presented because it had only recently been raised with sufficient specificity, and at other times, as when interviewed by federal agents and under oath before the grand jury and at Zabic's trial, Pavlovic had never made any reference to this matter. While Pavlovic's repeated failure to mention such alleged coercion previously certainly relates to the question of truthfulness of Pavlovic's testimony, the affirmative statement of Pavlovic's counsel that his client would

testify to Buljubasic's alleged coercion was sufficient basis to require the court to grant severance prior to trial. Any lingering doubt was dissipated at the onset of trial by Pavlovic's counsel's opening statement. He specifically referred to matters that he could present only through the testimony of his client: versions of conversations had between his client and Zabic, and versions of conversations between his client and Buljubasic, that were at total odds with what he knew Zabic and Buljubasic would testify to; the assertion that his client was afraid of Zabic and Buljubasic. (Tr. 65) The sole testimony to support these assertions had to come from Pavlovic himself. Hence, the trial court knew both prior to trial and on the first day of trial that Pavlovic intended to

testify to a defense which would require grant of severance, because Pavlovic's defense, if believed by the jury, would preclude the acquittal of Buljubasic.

Here, based on Pavlovic's defense, the court found it necessary to abort trial as to one of two defendants; fairness requires that the defendant who suffered prejudice due to a co-defendant's dilatory tactics be severed out, and that the dilatory co-defendant be required to proceed to trial. It is illogical and contrary to fundamental fairness to require Buljubasic to suffer the consequences of Pavlovic's presence in his trial both as an accusatorial co-defendant and as prosecutorial witness, where it was Pavlovic as defendant who was dilatory. Pavlovic's fault cannot

logically require the waiver of Buljubasic's due process rights.

The government asserts that the trial court's delaying the grant of the severance did not prejudice petitioner even though it permitted counsel for co-defendant to cross-examine government witnesses and the petitioner in a manner adverse to the interest of the petitioner. The position that there was no error because the examinations "did not add to the evidence already in the lists against petitioner" (Govt. Br., p. 8) involves closing one's eyes to what is a jury trial. A trial is not merely the submission of evidence to the jury; if it was, we would have computers and not jurors. Jurors are human beings; they are affected by innuendos and sarcasism. Prejudice occurs when the

defendant has his examination of a witness destroyed by co-counsel's examination of the same witness, when the defendant's credibility is damaged by the hostile cross-examination by co-counsel. Here, where normally co-counsel would not even have had the right to examine the petitioner[2] (United States v. Mercks, 304 F.2d 771 (4 Cir. 1962); United States v. Crockett, 41 CrL 2008 (4 Cir. 1987)), prejudice occurred.

The government, p. 8 of its Brief, admits that "Pavlovic's counsel buttressed the government's case against petitioner." The government asserts this is common in joint trials and such has

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2. The testimony of Buljubasic was not incriminating of Pavlovic. In substance, it was that he, Buljubasic, had nothing to do with setting the fire.

been held proper. However, in the case relied on by the government, there was no need for a severance. Here, a severance had to be and was granted. Prejudice which may be acceptable when the trial has to be joint is unacceptable where a severance must be granted.

Certiorari should be granted to resolve this issue.

2.

Neither the government's "separate matter distinction" nor its "passage of time distinction" avoids that there was a violation of the Doyle v. Hale Rule; nor can the error be excused as being inconsequential.

The error, the prosecutor relying on petitioner's silence and the court foreclosing petitioner from demonstrating the reason for his silence, was not inconsequential; the prosecutor thunderously argued to the jury that

petitioner's failure to report proved his guilt. The prosecutor argued:

> "And it is for that reason, ladies and gentlemen, that we put the significance that we do on his failure to report that he supposedly was being extorted ... He is not reporting because ... he is guilty of the crimes charged in this indictment." (Tr. 2876)

Here, where all incriminating witnesses were admitted accomplices or persons receiving a benefit for their testimony, this argument is not harmless error.

The government's assertion, p. 10 of its Brief, that petitioner was able to provide the same explanation for his conduct that he would have if he had been permitted to refer expressly to Miranda warnings is false. Silence after accusation, which normally carries an inference of guilt, lacks such inference

not merely because a person has been arrested, but specifically because he has been advised of his right to remain silent. United States v. Hale, 422 U.S. 171 at 177. Permitting the jury to know that petitioner was arrested would not have the same impact as having the petitioner testify to his reason for not reporting the incident, i.e., that he relied upon his Miranda warnings.

The government's argument that his "silence was in connection with a wholly separate matter" (Govt. Br., p. 9) is absurd. The extortion by Zabic was for money to appeal the arson conviction. Petitioner's reporting would relate petitioner's association with Zabic after his conviction. The government used this association as direct evidence of

petitioner's guilt. It was not a separate matter.

The opinion of the Court of Appeals that it was necessary to exclude petitioner's reason in order to also exclude testimony that police officers made ethnic slurs is erroneous. The trial court could have instructed petitioner that he could testify concerning the Miranda warnings while excising any reference to the ethnic slurs.

Petitioner's due process rights were violated when the government was permitted to rely on his silence while the petitioner was denied the right to explain the reason for his silence.

3.

Due process is violated where the petitioner is prevented from calling a witness who has exculpatory evidence by the government's refusal to grant use immunity where the sole interrogation of that witness would relate to a matter to which the witness has already pled guilty and where the government has presented its case primarily through the testimony of others granted immunity.

Neither United States v. Doe, 465 U.S. 605 (1984) nor Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) dealt with a situation as here. Applicable to this situation is this Court's holding that due process is violated where the defendant is prevented from presenting exculpatory evidence by the government's invocation of a procedural rule. Chambers v. Mississippi, 410 U.S. 284 (1973). The procedural rule that only the government can grant use immunity must, as the procedural rule in Chambers,

fall when in conflict with the compelling need of the criminal justice system to seek out the truth. New York v. Harris, 401 U.S. 222 (1971). Just as defendants cannot use the Fourth Amendment to foster perjury, Walder v. United States, 347 U.S. 62 (1954), so too the government should not be permitted to use its right to refuse to grant use immunity to prevent petitioner from bringing forth exculpatory evidence where there exists no valid reason to refuse the grant of use immunity. Here, there is no valid reason because the government loses nothing by granting use immunity against a co-defendant who had pled guilty, and when they had no real intent in prosecuting.

The government misconstrues the evidence when it asserts that Siprak's

testimony would not have been exculpatory. At the time Siprak pled guilty, there was inquiry concerning whether Siprak could assist the government against the petitioner by providing information. Siprak, through his attorney, related that although he desired to assist the government and desired a reduced sentence for such assistance, he could not provide information against the petitioner because to do so would be to lie.

The statements that the government asserts are inconsistent with Siprak's assertion that he did not know the petitioner and that petitioner was not present in direct contradiction to both Zabic and Pavlovic, were alleged statements made by Siprak to an investigator for Zabic which were never

affirmed by Siprak as being his statements.

Here, where all substantial witnesses against the petitioner had received de facto or de jure immunity, due process was denied by the government's tactic that resulted in excluding the crucial testimony of Siprak that disputed both Zabic and Pavlovic concerning petitioner's presence at a crucial meeting. Siprak's testimony would corroborate the petitioner's and demonstrate his innocence.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

FREDERICK F. COHN
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Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1608

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vs.

UNITED STATES OF AMERICA,

Respondent.

SECOND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 22.6

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IN THE
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Respondent.

SECOND SUPPLEMENT
TO PETITION FOR WRIT OF
CERTIORARI PURSUANT TO RULE 22.6

Petition for Writ of Certiorari was timely filed.

The Seventh Circuit affirmed on January 7, 1987. Within fourteen days--on January 21, 1987--petitioner filed a Petition for Rehearing En Banc. This filing of the Petition for Rehearing En Banc was timely under Rule 40 of the United States Court of Appeals for the

Seventh Circuit (formerly Circuit Rule 16). It also met the requirements of Federal Rule of Appellate Procedure Rule 35. The document was entitled "Petition for Rehearing En Banc."

On February 2, 1987, the United States Court of Appeals for the Seventh Circuit denied the Petition for Rehearing. Petition for Writ of Certiorari was mailed to the Court with an appropriate affidavit of mailing pursuant to Rule 28 on April 2, 1987, and under the rules of this Court would be deemed timely filed.

An issue was raised by the Clerk of this Court because the Order of the Seventh Circuit denying the Petition for Rehearing, for some reason absolutely incomprehensible to counsel and to the clerking staff of the Seventh Circuit Court of Appeals, indicates that a

suggestion for rehearing en banc (without a petition for rehearing) was filed.[1] The order reads:

> "Defendant-appellant filed a suggestion of rehearing en banc (without a petition for rehearing) on January 21, 1987. No judge in regular active service has requested a vote on the suggestion of rehearing en banc. The suggestion of rehearing en banc is DENIED."

The Clerk raised an issue of whether what was denied was in fact a Petition for Rehearing.

At the time that the Supplement to Petition for Writ of Certiorari was filed arguing to the Court that the matter was timely filed, a motion was also filed in the Seventh Circuit to modify the language of the Order dated February 2,

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1. In response to that issue, the first Supplement to Petition for Writ of Certiorari was filed.

1987. On September 3, 1987, the Seventh Circuit granted such motion, entering an Order so that its prior Order have added to it language which reads:

> "Treating the suggestion of rehearing en banc as a petition for rehearing, we deny the petition."

This most recent Order of the Court of Appeals is attached as Exhibit 1.

Based on this Order, there is no dispute that the Petition for Certiorari was timely filed.

Respectfully submitted,

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EXHIBIT 1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 3, 1987

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA	) Appeal from the) United States) District
Plaintiff-Appellee	) Court for the) Northern District
No. 86-1263 vs.	) of Illinois,) Eastern Division.
IVAN BULJUBASIC	) No. 84 CR 752
Defendant-Appellant.	) Barbara B. Crabb,) Judge

ORDER

Buljubasic has filed a "Motion to Modify Language of Order Dated February 2, 1987". Since the mandate has issued in this case, we must construe this motion as a request that we recall our mandate and modify the language of our order. We infer from the "Motion to Modify" that the language of our order has caused Buljubasic some problems in dealing with the Clerk of the Supreme Court. Having no desire to deny Buljubasic his opportunity to seek review of our decision, we now recall the

mandate and modify the order of February 2 by adding the following language: "Treating the suggestion of rehearing en banc as a petition for rehearing, we deny the petition."

The statement in the motion that the order of February 2 is "absolutely incomprehensible" suggests that Buljubasic's lawyer does not understand the difference between a petition for rehearing and a suggestion of rehearing en banc. The document filed with this court was styled: "Petition for Rehearing En Banc." Although the practice of the court has varied from time to time, the Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 62 (1987) warns counsel: "Do not mislabel the suggestion [for rehearing in banc] as a 'Petition for Rehearing In Banc.' There is no such thing. Depending on whether it is filed with a regular petition for rehearing, the correct label will be either 'Petition for Rehearing, with Suggestion for Rehearing In Banc' or merely 'Suggestion for Rehearing In Banc.'" See also Fed. R. App. P. 35(c), distinguishing between petitions for rehearing and suggestions of rehearing en banc. Counsel may request rehearing by the panel, rehearing by the full court (en banc), or both. Only a petition for rehearing by the panel requires a response from the court or affects the time to seek certiorari. Fed. R. App. P. 35(b) and (c); Stern, Gressman & Shapiro,

Supreme Court Practice 313 (6th ed. 1986). When a document is labeled "Petition for Rehearing En Banc", a natural conclusion is that counsel has mislabeled his "suggestion" as a "petition" and seeks only review by the full court. If counsel also wants review by the panel, the petition must say "Petition for Rehearing, with Suggestion for Rehearing In Banc", as our practitioner's manual explicitly states. As counsel was apparently unaware of proper appellate practice, we have amended our order. We trust future documents will accurately reflect counsel's objectives.